

# Summaries of Nebraska Supreme Court and Court of Appeals Decisions on Workers' Compensation Cases

Fiscal Year 2006: July 1, 2005 to June 30, 2006

## ***Supreme Court Cases:***

### **1. Vega v. Iowa Beef Processors, Inc., 270 Neb. 255, 699 N.W.2d 407 (2005)**

#### CAUSATION

#### MEDICAL EVIDENCE

The Supreme Court affirmed the review panel's finding that medical expenses incurred for plaintiff's back surgery were compensable, that the trial court erred in finding medical expenses for plaintiff's intestinal problems compensable, and that the case should be remanded for determination of whether certain medical expenses not addressed in the trial court's order were work-related and therefore compensable.

Plaintiff sustained four separate accidents involving injuries to his right shoulder, right knee, left elbow, and lower back while employed with defendant. An award was entered in favor of plaintiff in 1998 for indemnity benefits, and for current and future reasonable and necessary medical expenses. Plaintiff later sought treatment for his low back. Plaintiff's treating physician gave seemingly contradictory causation opinions, but the trial court found, and the review panel affirmed, that the medical expenses were compensable and defendant was ordered to pay for the recommended surgery. Although plaintiff's physician appeared to have provided conflicting causation opinions regarding the claimed back injury, the review panel noted that the physician's opinion failing to establish a causal connection was based on a hypothetical question asked by defendants which did not accurately reflect the facts of the case. In contrast, the physician's opinion provided to plaintiff's attorney in which the physician stated with reasonable medical certainty that plaintiff's back condition was an aggravation of the preexisting condition he sustained doing repetitive work on the job was based on his review of plaintiff's medical records. The Supreme Court affirmed the review panel's finding that this was sufficient competent evidence to determine that plaintiff's back complaints were causally related to his work injury, but declined to set a threshold which the evidence must meet in order for it to be considered competent medical evidence.

Plaintiff also sought treatment for gastrointestinal problems. Plaintiff claimed that he was unable to take medications prescribed for his compensable right knee injury because the medications bothered his stomach. Following testing, it was determined that plaintiff's gastrointestinal problems were caused by his diet and general state of obesity, as initially opined by plaintiff's physicians, rather than the medication he was taking for his right knee injury. The trial court determined that these medical expenses were compensable under Pavel v. Hughes Brothers, Inc., 167 Neb. 727, 94 N.W.2d 492 (1959), which allowed for recovery of medical expenses that were incurred for the purpose of determining whether an employee's continued disability related to his work-related accident. The review panel reversed and the Supreme Court affirmed, finding that Pavel was distinguishable because the record did not reflect any medical evidence causally relating plaintiff's gastrointestinal problems to his compensable knee injury.

Finally, the review panel had remanded the case on the issue of the compensability of certain medical expenses which were not addressed by the single judge in his award. Defendant relied on Dawes v. Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N.W.2d 167 (2003) for the proposition that the silence of the trial court's order regarding these expenses should be interpreted as a denial of those requests under the circumstances. However, in Dawes the

Supreme Court had specifically noted that while the trial court's omissions were not fatal to the finality of the award, they could nonetheless constitute error requiring reversal or remand of the case as the failure of the trial court to clearly determine an issue may not provide the basis for "meaningful appellate review" required by Rule 11 of the compensation court's Rules of Procedure. Therefore, in the instant case the review panel did not err in remanding the case for further findings regarding the omitted medical expenses.

## **2. Merrill v. Griswold's, Inc., 270 Neb. 458, 703 N.W.2d 893 (2005)**

### **JURISDICTION**

#### **FINAL APPEALABLE ORDERS**

The Supreme Court vacated and remanded the review panel's affirmance of the trial court award, finding that the review panel lacked jurisdiction.

Plaintiff sought treatment on April 6, 2000 and was diagnosed with lumbar muscle pain, spasm, and strain. He attended one physical therapy session and then returned to work. On October 6, 2000 plaintiff again experienced low back pain. He sought treatment and an MRI showed degenerative disc disease. Plaintiff's doctor reported that plaintiff had a pre-existing degenerative condition, but that pain was tolerated until onset of new radicular symptoms. Surgery was performed and plaintiff was released to return to work with no restrictions on December 26, 2000.

On October 9, 2001, plaintiff returned to his doctor complaining that he had recently developed pain in the right buttock and anterior thigh. An MRI showed several disc protrusions and plaintiff underwent a second surgery in March of 2002 after which he developed infections and a considerable amount of pain. He was unable to return to work. Plaintiff filed a petition alleging that he sustained lumbar degenerative disc disease or aggravation of lumbar disc disease as a result of repetitive motion injuries that occurred while he worked for defendant.

The trial court found the April 6, 2000 treatment was due to a compensable injury, but no temporary benefits were due, and plaintiff sustained neither permanent impairment nor loss of earning power. The trial court also found that plaintiff sustained a herniated lumbar disk while working on October 6, 2000 and awarded temporary disability benefits. The court was unable to find that the treatment beginning on October 1, 2001 was the result of any injury during the course and scope of plaintiff's employment. At the time of hearing, plaintiff asked the court to determine only the issue of liability and to give him additional time to gather evidence regarding permanent impairment. The trial court granted plaintiff's request, and ordered that further hearing on the issues of loss of earning power and vocational rehabilitation would be held at a later date, upon application of either party.

On appeal, plaintiff argued that the award was interlocutory and not final for purposes of appeal because it did not determine the issue of permanent benefits. The review panel found that the trial court had determined all issues submitted to it and therefore the award was appealable. The review panel affirmed and awarded plaintiff attorney fees. The Court of Appeals affirmed in all respects, except it modified the trial court's award to provide that plaintiff was not entitled to vocational rehabilitation since he was able to return to the same job after the November 2000 surgery. The Court of Appeals also awarded plaintiff additional attorney fees. Defendants again appealed, claiming that since the Court of Appeals modified the trial court's award regarding vocational rehabilitation, it erred in awarding plaintiff attorney fees.

The Supreme Court began by stating the principle that an appellate court must settle jurisdictional issues before reaching the legal issues presented for review, such as whether the trial court's award was a final appealable order. Section 48-179 of the Nebraska Workers' Compensation Act provides that either party at interest may seek review if the party refuses to accept "the final findings, order, award or judgment" of the trial court. In Dawes v. Wittrock Sandblasting and Painting, 266 Neb. 256, 667 N.W.2d 167 (2003), the Supreme Court found that an award was a final adjudication, despite the fact that there were issues not discussed, because the trial court did not expressly reserve those issues for later determination. In the present case, the trial court reserved for later determination the issues of plaintiff's permanent impairment and entitlement to vocational rehabilitation benefits relating to the October 6, 2000

injury. The Supreme Court held that because the trial court reserved ruling on these issues, the trial court's order was interlocutory. As such, the review panel did not have jurisdiction to consider it, nor did the Court of Appeals. The Supreme Court vacated the judgment and remanded the cause with instructions for the review panel to dismiss the application for review.

**3. Kimminau v. Uribe Refuse Service and EMC Insurance Company, 270 Neb. 682, 707 N.W.2d 229 (2005)**

EQUITABLE JURISDICTION

MEDICAL EXPENSES

STATUTORY CONSTRUCTION

SUBROGATION

The Supreme Court remanded the case for further proceedings in accordance with §48-120(8).

The plaintiff was employed by defendant for approximately 10 years before suffering an injury to his left shoulder. The trial court found the injury to be compensable and ordered defendant to pay medical expenses. However, the trial court refused to order defendant to reimburse plaintiff's health carrier for medical expenses paid, citing the Supreme Court decision in Dawes v. Wittrock Sandblasting & Painting, 266 Neb. 526, 667 N.W.2d 167 (2003). The review panel affirmed.

In Dawes, the Supreme Court held that the Workers' Compensation Court did not have general equitable jurisdiction to resolve contractual disputes between employees and third party insurers and therefore did not have jurisdiction to determine the insurer's subrogation interest. However, the Supreme Court failed to consider §48-120(8) in reaching its decision.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. Rauscher v. City of Lincoln, 269 Neb. 267, 691 N.W.2d 844 (2005). The Court noted that the plain language of §48-120(8) clearly provides that the Workers' Compensation Court shall order the employer to directly reimburse medical care providers and medical insurers for the reasonable medical, surgical, and hospital services under §48-120.

The Supreme Court held that to the extent its holding in Dawes conflicts with the express provisions of §48-120(8), the Court's holding in Dawes is disapproved.

#### **4. Rodriguez v. Hirschbach Motor Lines, 270 Neb. 757, 707 N.W.2d 232 (2005)**

MAXIMUM MEDICAL IMPROVEMENT

REASONABLE MEDICAL EXPENSES

LOSS OF EARNING POWER

The Supreme Court affirmed the compensation court's denial of plaintiff's request for gastric bypass surgery. However, the case was reversed in part and remanded because the compensation court erred in concluding that plaintiff had reached maximum medical improvement and in making a determination as to his permanent partial disability.

Plaintiff suffered work-related injuries to his neck, shoulders, knees, and back in addition to severe depression. He was found to have reached maximum medical improvement with regard to all of those injuries except his knees. The trial court concluded that plaintiff had reached maximum medical improvement with no permanent disability with regard to his neck, back, shoulder, and psychological injuries, but that he had not yet reached maximum medical improvement with regard to his bilateral knee injuries. Therefore, the trial court entered an award maintaining temporary total disability benefits for the injury to plaintiff's knees, and denying permanent disability benefits. The trial court further held that the record did not establish that plaintiff's requested gastric bypass surgery to help achieve the weight loss necessary to permit spinal surgery was reasonable and necessary. The review panel affirmed the trial court's award.

On appeal, plaintiff argued the compensation court erred in concluding that he had reached maximum medical improvement with regard to some, but not all of his injuries, and in denying permanent partial disability benefits for those injuries instead of waiting until all his injuries, including his scheduled member injuries to his knees, could be considered together in assessing his loss of earning power as required under Zavala v. ConAgra Beef Co., 265 Neb. 188, 655 N.W.2d 692 (2003). The Supreme Court held that the legally significant date of maximum medical improvement for purposes of ending a workers' compensation claimant's temporary disability is the date upon which the claimant has attained maximum medical improvement for all of the injuries sustained in a particular compensable accident; there is no provision in Nebraska law for "partial maximum medical improvement." The evidence on the record in the instant case was insufficient to conclude that plaintiff had reached maximum medical improvement or that the extent of his permanent disability, if any, could be ascertained without considering the effect of his knee injuries. With regard to the gastric bypass surgery, the Supreme Court noted that in some circumstances, a medically necessary weight loss program may be compensable. However, in the instant case, the sparse record was not sufficient to indicate whether gastric bypass surgery was medically reasonable and necessary to treat plaintiff's compensable injuries and whether such a surgery would even suffice to make plaintiff a candidate for further surgery to treat his compensable injuries. The additional level of speculation about the possible results of the proposed gastric bypass surgery was sufficient to support the trial court's determination.

## **5. Ortiz v. Cement Products, 270 Neb. 787, 708 N.W.2d 610 (2005)**

### STATUTORY CONSTRUCTION

### UNDOCUMENTED WORKERS

### VOCATIONAL REHABILITATION

The Supreme Court affirmed the review panel decision that the plaintiff was not entitled to vocational rehabilitation.

Plaintiff, a Mexican citizen, worked in the United States as a laborer since 1990. When applying for a job with the defendant in 2001, he filled out an employment eligibility verification form and falsely indicated that he was a lawful resident alien and was authorized to work in the United States.

The plaintiff suffered a leg injury and the trial court awarded benefits, including vocational rehabilitation services. The trial court noted that while plaintiff could not be legally employed in the United States, he would be unable to perform jobs for which he had training in Mexico due to his work restrictions, and was therefore entitled to vocational rehabilitation benefits. The review panel reversed the award of vocational rehabilitation services, finding that because plaintiff was not legally authorized to work in the United States, he was not entitled to vocational rehabilitation services.

The purpose of vocational rehabilitation under workers' compensation is to restore an injured employee to suitable gainful employment. Rodriguez v. Monfort, Inc., 262 Neb. 800, 635 N.W.2d 439 (2001). The Supreme Court stated that, in order to effectuate this purpose, the employee must be eligible and willing to return to employment. At trial, plaintiff testified that he intended to remain in the United States, where he may not be lawfully employed because of his immigration status. See 8 U.S.C §1324a(2000). The Supreme Court reasoned that awarding vocational rehabilitation would be contrary to the statutory purpose of returning him to suitable employment. Therefore, plaintiff was not entitled to vocational rehabilitation services.

## **6. Turco v. Schuning, 271 Neb. 770, 716 N.W.2d 415 (2006).**

### SUBROGATION

### DISTRIBUTION OF SETTLEMENT PROCEEDS

### STATUTORY CONSTRUCTION

The Supreme Court reversed the district court's application of the "made whole" doctrine under §48-118. The district court held that the workers' compensation carrier could not receive any distribution of the third party settlement because the employee's damages exceeded the amount of the third-party settlement.

Plaintiff was injured in a motor vehicle accident and settled a claim against the other driver's insurance company for \$250,000. The workers' compensation carrier provided the employee with \$145,682.50 in workers' compensation benefits. Plaintiff filed an action in the district court for a fair and equitable distribution of the settlement pursuant to §48-118. The district court determined that plaintiff's damages were: lost income of \$125,000, lost earning capacity of \$300,000, pain and suffering of \$80,000 and medical expenses of \$80,000 [in excess of the amount of the settlement]. The district court found that as the plaintiff could not be "made whole" by the settlement, the workers' compensation carrier would not receive any of the settlement, and the entirety would go to plaintiff.

The Supreme Court determined that §48-118 does not contain the "made whole" doctrine. Section 48-118 allows a workers' compensation carrier a subrogation interest against any third-party recovery. The Court explained that under purely equitable subrogation, the insurer may only exercise a subrogation right if the third-party recovery is greater than the damage sustained by the injured party; this is the "made whole" doctrine. Statutory subrogation is different from equitable subrogation, and generally does not contain equitable principles. After §48-118 was amended in 1994, however, equity was injected into the statutory subrogation by the addition of language that the court must make a "fair and equitable distribution" of the settlement. Nonetheless, the Supreme Court relied on a plain reading of §48-118 and concluded that the 1994 amendment did not adopt the "made whole" doctrine. Thus, it was error for the district court to apply it.

The Supreme Court also stated that §48-118 does not require application of a particular formula in determining a fair and equitable distribution, and it specifically declined to apply a proportionality requirement for the distribution as requested by defendants. Distribution of the settlement is within the discretion of the district court. However, because it was error for the district court to apply the "made whole" doctrine, the decision was reversed and remanded for a determination of the subrogation interest. The Court also noted that upon remand if the workers' compensation carrier was entitled to a portion of the settlement, apportionment of attorney fees must also be considered.

## ***Court of Appeals Cases (Designated for Permanent Publication):***

### **1. Meredith v. Schwarck Quarries, 13 Neb. App. 765, 701 N.W.2d 387 (2005)**

#### **AUTHORITY ON REMAND**

#### **REASONED DECISIONS**

The Court of Appeals affirmed the trial court's findings and reversed the review panel's remand regarding permanent disability benefits.

The trial court found that the plaintiff suffered an injury on September 1, 1999 and awarded temporary total benefits, medical and hospital benefits, found that the plaintiff sustained a 44 percent loss of earning power, and awarded vocational rehabilitation services. The review panel affirmed, stating that the findings of fact were not clearly wrong and there were no errors of law. The Court of Appeals affirmed the trial court's decision with regard to causation, but reversed and remanded the award of disability benefits for a reasoned decision in accordance with Nebraska Workers' Compensation Court Rule of Procedure 11.

On remand, the trial court again awarded temporary total benefits, found that the claimant had reached maximum medical improvement, awarded vocational rehabilitation benefits, but found that the plaintiff was permanently and totally disabled, as opposed to the 44 percent loss of earning capacity as previously found. The review panel affirmed the finding regarding temporary disability benefits and the date of maximum medical improvement, but reversed the finding regarding permanent disability, stating that the trial court exceeded its authority on remand when it redetermined the extent of permanent disability.

The Court of Appeals affirmed the trial court's findings on temporary total disability benefits, maximum medical improvement, vocational rehabilitation services, and permanent disability. When a case is remanded with specific directions, the court to which the mandate is directed has no power to do anything but obey the mandate. State v. Williams, 253 Neb. 111, 568 N.W.2d 246 (1997). However, regarding the extent of disability, the Court noted that the original remand was not an instruction to enter a final judgment, but an instruction to enter an order complying with Rule 11. The remand order did not prevent the trial court from modifying its prior order if the court determined that the evidence as it already existed on the record supported a different determination of disability. And on remand, the trial court entered an order in compliance with Rule 11. In addition, when first before the Court of Appeals, the Court did not make a finding regarding permanent disability. Rather, the Court was unable to determine whether the trial court's award of permanent disability was correct because they did not know upon what evidence the finding was based. The Court opined that if the trial court discovered on remand that its reasoning supported a different determination of disability, the court should be able to enter an order in compliance with Rule 11 that has the proper finding and specifies the evidence relied upon in making such a determination.

Therefore, the Court of Appeals found that the review panel erred in reversing the order of the trial court on the basis that the trial court exceeded its authority in modifying its original order.

## **2. Grandt v. Douglas County, 14 Neb.App. 219, 705 N.W.2d 600 (2005)**

### **LOSS OF EARNING POWER**

### **VOCATIONAL REHABILITATION**

The Court of Appeals affirmed the compensation court's finding that the trial judge did not err in considering the beneficial effects of completion of a vocational rehabilitation plan in making a determination of loss of earning power.

There was no factual dispute that plaintiff suffered a back injury while employed by defendant as a nurse. Defendant began making payments to plaintiff without any proceedings before the court. The court-appointed vocational rehabilitation counselor developed a plan for plaintiff to obtain an associate degree and opined that plaintiff had sustained a 35-45 percent loss of earning power as of the date she reached maximum medical improvement. The counselor determined that plaintiff's loss of earning power had been reduced to 25-35 percent upon completion of the plan. Defendant unilaterally began making payments to plaintiff based on 25 percent loss of earning power. Plaintiff then filed a petition. The trial court held and the review panel affirmed that plaintiff was entitled to 40 percent loss of earning power prior to completion of the vocational rehabilitation plan and 30 percent loss of earning power after that date.

Plaintiff argued that §48-121(2) does not provide for a reduction of permanent partial disability benefits following the completion of a vocational rehabilitation plan; therefore, the compensation court does not have authority to change the rate of benefits at that time. The Court of Appeals disagreed, finding that §48-121(2) requires only that loss of earning power be calculated after the injury, and that the period following a vocational rehabilitation plan fits within that time frame. Plaintiff contended that no language in Gibson v. Kurt Mfg., 255 Neb. 255, 583 N.W.2d 767 (1998) or Collins v. General Casualty, 258 Neb. 825, 606 N.W.2d 93 (2000) allows the trial court to find that completion of vocational rehabilitation has reduced the claimant's loss of earning power. The Court of Appeals determined that those cases were distinguishable, noting that the trials in Gibson and Collins were held before the claimant completed vocational rehabilitation and the assessment of the loss of earning power had been postponed. In the instant case, the trial was held after completion of vocational rehabilitation and the trial court made a loss of earning power determination based on all of the evidence available to it at the time of trial. Plaintiff received compensation for loss of earning power during the period between the date of maximum medical improvement and completion of vocational rehabilitation, alleviating the principal concern in Gibson. In Gibson, deferment of determination of the extent of the loss effectively denied that claimant any compensation for loss of earning power until completion of all appeals. In Collins, the Supreme Court held that the trial court was obligated to determine loss of earning power at the time the claimant reached maximum medical improvement, because it would be error to speculate about the results of the vocational rehabilitation. The Court of Appeals found that the Supreme Court in Collins addressed the issue merely as a problem of speculation, and if vocational rehabilitation had been completed, as in the instant case, then the trial court could have properly considered the results.

### **3. Tomlin v. Densberger Drywall Inc., 14 Neb. App. 288, 706 N.W.2d 595 (2005)**

ACCIDENT

REPETITIVE TRAUMA

DATE OF INJURY

CAUSATION

MEDICAL EXPENSES

The Court of Appeals upheld the review panel's affirmance of the trial court's finding that plaintiff injured his shoulder in an accident arising out of employment.

Plaintiff worked in the drywall industry for several years before being employed at the defendant employer in July 2001. In June 2002 he reported pain in his right shoulder, and on November 8, 2002, plaintiff had a right shoulder hemiarthroplasty. Plaintiff's orthopedic surgeon opined that plaintiff's many years of repetitive work involved in hanging drywall contributed to plaintiff's right shoulder arthritis. A second physician opined the repetitive and heavy work in drywall "substantially contributed" to plaintiff's right shoulder injury. A third physician opined the shoulder injury was not a result of his work with defendant, nor had that work aggravated a preexisting condition. The trial court found that the plaintiff injured his shoulder in an accident arising out of and in the course of his employment. The "suddenly and violently" requirement of the definition of accident was satisfied when plaintiff missed work and sought treatment for his surgery on November 8, 2002, which was also the date of accident. See Armstrong v. Watkins Concrete Block, 12 Neb. App. 729, 738, 685 N.W.2d 495, 504 (2004). The trial court awarded benefits including medical and mileage expenses for dates of service before the date of accident.

The Court of Appeals affirmed the finding of causation. Although there were conflicting medical reports on the issue, it was within the province of the trial court to determine which medical opinion to adopt. The Court of Appeals also agreed with the trial court's finding that the plaintiff had proven an accident within the Workers' Compensation Act. Plaintiff testified that he did not know when he was injured and that nothing happened suddenly or violently to cause symptoms of an injury. Plaintiff did not miss work for any of his non-surgical medical visits, but he did miss work to have surgery on his shoulder. Citing Armstrong, the Court agreed that this event satisfied the suddenly and violently requirement because plaintiff stopped working at an identifiable point in time.

Additionally, the Court of Appeals upheld the award of medical and mileage benefits that were incurred prior to the date of accident. In repetitive trauma injuries, the Court explained, the "date of injury" must be conceded to be a bit of a necessary legal artifice, articulated by the appellate courts in order for such cases to be manageable within the statutory framework of an accident. The Court noted that the only limitation on medical expenses contained in §48-120 is that those expenses be reasonable and necessary. The court could find no rational reason for a rule precluding the award of medical expenses incurred before the date of accident in a repetitive trauma case. Under Nebraska precedent, the date of injury for a repetitive trauma injury is fixed by case law, meaning that the employee can incur expenses before the "technical" date of injury. Plaintiff's medical and mileage expenses were reasonably necessary and related to his compensable injury. Therefore, the trial court did not err in allowing both.

Finally, in spite of defendants' objections, the Court of Appeals held that several exhibits in the form of medical reports were relevant, as were summaries of medical expenses and mileage. The Court reminded the defendants of the longstanding rule that when an employee presents

evidence of medical expenses from a work-related injury, a prima facie case of reasonableness has been made, causing the burden to shift to the employer to adduce evidence that the expenses are not fair and reasonable. See Bituminous Casualty Corp. v. Deyle, 234 Neb. 537, 451 N.W.2d 910 (1990). Further, the defendants also submitted a summary of medical expenses, and therefore were not prejudiced by the admission of the plaintiff's similar summary.

#### 4. Bronzynski v. Model Electric, Inc. 14 Neb. App. 355, 707 N.W.2d 46 (2005)

##### MODIFICATION

##### WAITING-TIME PENALTY

The Court of Appeals affirmed the review panel's reversal of the trial court's decision to increase plaintiff's permanent partial disability benefits. Additionally, the Court affirmed the trial court's award of attorney fees relating to an award of delinquent medical payments and the trial court's decision not to award a 50 percent waiting-time penalty.

The plaintiff suffered a work-related injury when he fell several feet from the top of a ladder, striking his head on the floor. The trial judge awarded plaintiff a 15 percent loss of earning power, temporary total benefits, future medical expenses and vocational rehabilitation. The plaintiff filed an Application to Modify, seeking various medical expenses, an additional period of temporary total disability, vocational rehabilitation and penalties and fees. Plaintiff asserted that he was required to undergo revision fusion surgery of his cervical spine and due to this surgery, he was entitled to further benefits. Plaintiff did not argue that he had sustained an increase in loss of earning capacity.

The trial court entered an award and concluded that the plaintiff had experienced a material and substantial increase of incapacity sufficient to entitle plaintiff to a 25 percent loss of earning power, from and after the date the Application to Modify was filed. The trial court also ordered the defendant to pay additional medical expenses and attorney fees, but denied plaintiff's request for additional temporary total disability because the requested period for temporary total disability benefits preceded the date the Motion to Modify was filed and the court was precluded from modifying an award retroactively prior to such date. The review panel reversed the trial court's finding that plaintiff was entitled to an increase in permanent partial disability benefits and affirmed the court's order of attorney fees and denial of temporary total disability benefits, interest and penalties.

The Court of Appeals held plaintiff did not meet his statutory requirements for modification of an award pursuant to Neb. Rev. Stat. §48-141 (Reissue 2004). In the context of body as a whole injuries, an applicant who must fulfill the requirements set forth in §48-141 by demonstrating a change in incapacity must establish both a change in the employee's physical condition or impairment, and a change in the employee's disability. Gibson v. Kurt Mfg., 255 Neb. 255, 583 N.W.2d 767 (1998). The Court of Appeals noted that "impairment" is a medical assessment, while "disability" is a legal issue. Green v. Drivers Mgmt., Inc., 263 Neb. 197, 639 N.W.2d 94 (2002). While the medical evidence indicated that plaintiff suffered an increase in impairment, there was no evidence that he had suffered an increased loss of earning capacity. The Court held that contrary to plaintiff's position, it is not self-evident that an increase in physical impairment results in an increase in disability. Therefore, the Court concluded that the trial court was clearly wrong in finding that the plaintiff proved by a preponderance of the evidence that there had been a substantial increase in his incapacity. Thus, the decision by the review panel was affirmed.

The Court of Appeals further agreed that the filing date of the Application to Modify must be construed as the operative date for awarding retroactive benefits. The Court affirmed the decision of the review panel upholding the trial court's determination that the trial court was precluded from modifying the award retroactively prior to the filing date of plaintiff's application.

The Court of Appeals also addressed plaintiff's request for penalties and attorney fees. The trial court awarded attorney fees based on its award of delinquent medical payments, finding that no reasonable controversy existed regarding the necessity and reasonableness of the second cervical fusion. The review panel found that attorney fees were properly ordered concerning the

award for medical expenses and agreed that no interest or waiting-time penalty was appropriate. The Court held when there is no reasonable controversy regarding an employee's entitlement to workers' compensation, Neb. Rev. Stat. §48-125 authorizes an award to the employee of an attorney fee and a 50 percent payment for waiting time on delinquent compensation payments. Roesler v. Farmland Foods, 232 Neb. 842, 442 N.W.2d 398 (1989). But, under §48-125 a 50 percent waiting-time penalty cannot be awarded on the basis of an award of delinquent medical payments; a waiting-time penalty is available only on awards of delinquent payments of disability or indemnity benefits, not on awards of medical payments. Therefore, the trial court's award of attorney fees and denial of interest and waiting-time penalties regarding delinquent medical expenses was proper pursuant to §48-125.

## **5. Wells v. Goodyear Tire & Rubber Company, 14 Neb.App. 384, 707 N.W.2d 438 (2005)**

### **JURISDICTION**

### **ATTORNEY FEES**

The Court of Appeals dismissed the appeal regarding the fee dispute between plaintiff's former and current attorneys for lack of jurisdiction.

Plaintiff sought compensation for injuries sustained in a work accident. A dispute arose over the division of the attorney fee between plaintiff's first attorneys and his second attorney. Prior to the trial court's award, plaintiff's first attorneys were given a lien in the compensation court for attorney fees. The amount of which lien was to be determined at a later date. When negotiations on the amount of the lien failed, plaintiff's first attorneys requested a hearing. The trial court heard testimony from all of the attorneys involved and concluded that plaintiff's attorneys were entitled to a reasonable attorney fee of \$1,250.00. The second attorney appealed. The review panel affirmed that the first attorneys were entitled to a reasonable fee, but reversed the amount awarded as clearly excessive and remanded for a finding regarding a reasonable fee. On remand, the trial court held that the \$1,250.00 awarded to the first attorneys was an equitable distribution of the fee based upon the services performed by each of the lawyers. Plaintiff's second attorney again appealed to the review panel, which found that the trial court's findings on remand were contrary to Nebraska's appellate jurisprudence and the order of the review panel. The review panel again remanded the matter to the trial court. Plaintiff's second attorney appealed, and plaintiff's first attorneys cross-appealed to the Court of Appeals.

The power of the compensation court to award attorney fees is derived from Neb.Rev.Stat. §48-108. The Court noted that it had previously interpreted §48-108 as limiting the compensation court's regulation and disbursement matters to those which arise between the injured worker and the attorney representing the injured worker. Further, §48-162.03(1) provides that the compensation court may hear motions brought only by parties to a suit or proceeding before the court. In the instant case, plaintiff's first attorneys were not a party to a proceeding before the compensation court, nor did they represent a party to such proceeding at the time they filed their motion seeking a determination of the fees owed. Therefore, the compensation court lacked jurisdiction to consider the issue, as did this Court. The Court dismissed both the appeal and cross-appeal for lack of jurisdiction and remanded with directions to vacate the compensation court's orders awarding attorney fees and to dismiss the first attorneys' motion.

**6. Zach et al v. Nebraska State Patrol, 14 Neb. App. 579, 710 N.W.2d 877 (2006)**

ACCIDENT

FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

MENTAL STRESS

OCCUPATIONAL DISEASE

The Court of Appeals affirmed the review panel's finding that the petition should not have been dismissed by the trial court.

The decedent was a state trooper who stopped multiple suspects in a motor vehicle and found one of them armed with a pistol. Due to miscommunication or error, the handgun was not identified as stolen and the suspects were let go. Subsequently, the suspects were involved in a bank robbery in which several people were murdered. The decedent felt responsible, became distraught, and two weeks later committed suicide.

The petition alleged that decedent suffered an "accident" because the sudden stimulus of being advised of the situation caused his brain to undergo physical changes, or that he suffered an "occupational disease" because exposure of the stress resulted in mental disease. The trial court found that because the petition failed to allege a physical injury, it failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the Nebraska Rules of Pleadings in Civil Cases.

The Court of Appeals stated that the only question was whether the petition stated a claim upon which relief could be granted. A trial court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6) is reviewed de novo, accepting all the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party. Anderson v. Wells Fargo Fin. Accept., 269 Neb. 595, 694 N.W.2d 625 (2005). In this case, whether physical changes in decedent's brain constituted an injury was an issue to be determined by the evidence, rather than at this procedural juncture. Complaints should be construed liberally in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief. A complaint should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery. Spear T Ranch v. Nebraska Dept. of Corr. Servs., 269 Neb 40, 690 N.W.2d 574 (2005).

A majority of the Court of Appeals found that taking all of the allegations in the petition as true and drawing all reasonable inferences in favor of plaintiff, the petition did state a claim upon which relief could be granted and plaintiffs were entitled to an opportunity to show that the physical changes in decedent's brain constituted a compensable injury.

One dissenting judge opined that prior Supreme Court holdings defining injury as requiring "violence to the physical structure of the body" required more than a mere physical change to establish a compensable injury. Therefore, plaintiff's petition failed to state a claim upon which relief could be granted.

## **7. Miller v. Commer. Contrs. Equip., Inc., 14 Neb. App. 606, 711 N.W.2d 893 (2006)**

### INTERVENTION

### STIPULATIONS

### PUBLIC POLICY

The Court of Appeals dismissed Travelers' appeal, finding that the review panel committed plain error when it allowed the insurance company to intervene after trial in spite of the fact that it had voluntarily withdrawn from the litigation previously.

The plaintiff filed a petition alleging that he suffered two compensable accidents with the defendant employer. Zurich was the carrier for the alleged 1999 date of injury, and Travelers was the carrier for the alleged 2001 date of injury. Prior to trial, Travelers was dismissed pursuant to a stipulation of the parties that Travelers should be dismissed for lack of present controversy. The trial judge found both dates of injury to be compensable, and that the latter accident was not a recurrence but an aggravation of the 1999 injury. Commercial Contractors and Zurich appealed the decision. Travelers sought to intervene in the appeal, and the review panel granted Travelers' intervention.

The Court of Appeals held that it was plain error for the review panel to allow Travelers to intervene in the appeal. While the Workers' Compensation Act does not provide rules on intervention, and the Workers' Compensation Court is not bound by rules of procedure not within the Act, the Court looked to the general intervention statute, §25-328, for guidance. The Court stated that generally intervention cannot be obtained as a matter of right after judgment. Zurich and Travelers argued that the best justification for permitting the intervention was that all parties agreed to it. The general rule is that parties are bound by stipulations voluntarily made. See Mischke v. Mischke, 253 Neb. 439, 571 N.W.2d 248 (1997). In Nebraska, parties are free to make stipulations that govern their rights, and such stipulations will be respected and enforced by courts so long as the agreement is not contrary to public policy or good morals. Id. In the instant case, however, the Court stated that "allowing the insurer to sit idly by and gamble on a favorable result, and then intervene and assert error when the trial result is unfavorable as concerns its coverage, does not comport with the policy and procedure for intervention under Nebraska law." Because Travelers was clearly on notice that it may be subject to liability for the 2001 accident, and it voluntarily withdrew from the case prior to trial, it would have been contrary to the policies of intervention to allow Travelers to intervene on appeal after it was allowed to speculate on the trial outcome. Therefore, the review panel committed plain error when it allowed the intervention, and Travelers' appeal was dismissed.

The Court of Appeals found all of the employer's allegations of error to be without merit as there was sufficient evidence in the record to support those factual findings made by the trial court.

## 8. Scott v. Drivers Management, 14 Neb. App. 630, 714 N.W.2d 23 (2006)

PRE-EXISTING CONDITION

PHYSICIAN/PATIENT PRIVILEGE

AVERAGE WEEKLY WAGE

The Court of Appeals affirmed the review panel's findings regarding plaintiff's pre-existing posttraumatic stress disorder (PTSD), and ex parte communications between employer and plaintiff's physician, but reversed the panel on the question of plaintiff's average weekly wage.

Plaintiff suffered injuries after being struck by a vehicle while he was walking back to his truck. Prior to trial, the plaintiff filed a "Motion to Strike the Opinions of [Scott's] Treating Psychologist, Richard Dowell, Jr., Which Were Obtained *Ex Parte*." Plaintiff's motion contended that defendant's counsel contacted Dr. Dowell ex parte on several occasions to discuss the treatment provided to the plaintiff by Dr. Dowell with additional documentation prepared by defendant's retained expert and asked Dr. Dowell to formulate opinions based upon this information. Dr. Dowell did formulate such opinions.

The motion was heard at the time of trial and overruled.

The trial court found the plaintiff to be permanently and totally disabled as a result of his injuries. The court held that, while it was uncontested that the plaintiff suffered from pre-existing PTSD after serving in Vietnam, plaintiff was able to work consistently since his discharge from the service and had not sought treatment for his PTSD since the late 1980s, until his work related accident. The court held that at the time of said accident and injury, plaintiff was receiving an average weekly wage of \$672.98 being sufficient to entitle him to benefits of \$444.000 (the statutory maximum).

Defendant appealed to the review panel. The review panel remanded the case because the trial court had not sufficiently recognized and considered previous treatment the plaintiff had received for PTSD. The review panel found that "the trial court believed, and made a finding of fact in the Award of August 29, 2003, that plaintiff had not sought treatment from the [VA] for his [PTSD] since the late 1980's." The review panel held the evidence established plaintiff had treated from 1990 through 1995 for his PTSD and additional medical issues. Regarding plaintiff's average wage, the review panel held that the trial court did err when it improperly excluded three weeks wages from the average weekly wage calculation because "no testimony offered a sufficient explanation regarding the weeks in question to cause exclusion." Finally, the review panel affirmed the trial court's holding denying plaintiff's motion to strike portions of Dr. Dowell's testimony.

The Court of Appeals held the record was clear that plaintiff did in fact receive some treatment for his pre-existing PTSD during the early- to mid- 1990's. The Court agreed the degree of pre-existing PTSD and plaintiff's history of treatment and its effect on plaintiff was critical to a final determination of plaintiff's status. The case was remanded so the trial court could re-weigh the evidence, aware of plaintiff's history of treatment.

Regarding plaintiff's average weekly wage, the Court held that the trial court had made a finding of fact, that this fact was not clearly erroneous, and the review panel's holding was reversed. Testimony explaining abnormally low work weeks was not necessary. With regard to the issue of ex parte communication between defendant and plaintiff's treating psychologist, the Court of Appeals found plaintiff's argument to be "misplaced." Under Neb. Rev. Stat. §48-120(4) (Supp. 2006), when an injured worker is seeking compensation for an injury from his employer and the employer seeks relevant information from the injured worker's treating physician regarding that injury, that information is not privileged.

One judge dissented regarding the average weekly wage, opining that abnormally low work weeks may be excluded from the compensation court's calculation of the average weekly wage only when the record presents a sufficient explanation regarding the weeks in question.

## 9. Griffin v. Drivers Management, Inc., 14 Neb. App. 722, 714 N.W.2d 749 (2006)

### AVERAGE WEEKLY WAGE

The Court of Appeals held that the review panel erred in reversing the trial court's finding of plaintiff's average weekly wage. All other findings of the review panel were affirmed including reversal of penalties, that plaintiff was not permanently totally disabled, and that plaintiff failed to prove that a stroke and related complications were causally related to the work injury.

Plaintiff was hired by defendant on or about November 26, 2001. Plaintiff was first employed as a "co-driver." As a "co-driver", Plaintiff was required to drive with another driver and was paid a flat salary of \$375 per week. In late December 2001, plaintiff's status with defendant changed from "co-driver" to "company driver." As a "company driver," plaintiff drove more hours and was paid a contractual rate of 27 cents per mile. Plaintiff testified that he earned approximately \$1,258 the first week he was a "company driver."

On December 31, 2001, plaintiff slipped and fell on some ice. Plaintiff suffered injuries to his right side and right hip. At trial, plaintiff was awarded benefits for a 25 percent loss of earning capacity, future medical expenses, vocation rehabilitation and a 50 percent waiting-time penalty. The trial court based plaintiff's benefit award on an average weekly wage calculation that included only the period of time which plaintiff was a "company driver" and was paid based on his mileage. On appeal, the review panel held that the trial court, in determining plaintiff's average weekly wage, erred in limiting plaintiff's earnings to the period of time plaintiff was a "company driver." The issue was remanded with instructions to the trial court to determine how much, if any, of plaintiff's earning as a "co-driver" being paid a fixed weekly salary should be used in the calculation of plaintiff's average weekly wage. The review panel also reversed the trial court's holdings regarding loss of earning capacity and waiting-time penalties. The remainder of the award was affirmed.

The Court of Appeals noted that the review panel relied on Mutchie v. M.L. Rawlings Ice Co., 122 Neb 297 (1932), in concluding that the trial court was incorrect to include in the average weekly wage calculation only those earnings plaintiff was paid based on his mileage. In Mutchie, the employee was initially paid a weekly salary and was later paid an hourly wage. The Nebraska Supreme Court, in including all of the earnings in the average weekly wage calculation, emphasized that the employee was "engaged in the same character of employment." Id. The Court of Appeals stated that a plain reading of Neb. Rev. Stat. §48-126 suggests that the average weekly wage pertains only to periods of time during which an employee's rate of wages is fixed by the day or hour or by the output of the employee. The Court of Appeals went on to distinguish Mutchie by reasoning that the character of plaintiff's employment was not the same under the different wage schedules of "co-driver" and "company driver," so including plaintiff's wages when he was paid a salary would distort plaintiff's average weekly wage calculation. The Court of Appeals held that the trial court correctly calculated plaintiff's average weekly wage, including from the six months preceding the accident only the earnings plaintiff was paid based upon his mileage.

The Court affirmed the review panel's reversal of penalties and attorney fees due to the reasonable controversy concerning plaintiff's average weekly wage. Additionally, the Court affirmed the review panel's holding that plaintiff had failed to prove a causal connection between the accident and plaintiff's subsequent stroke and related complications. The Court noted that plaintiff's evidence concerning causation of his stroke was not particularly persuasive in light of the amounts of Vioxx taken by plaintiff or the periods of time during which it was ingested. Finally, the Court affirmed the review panel's holding that plaintiff was not permanently and totally disabled.

One judge dissented regarding average weekly wage, opining that plaintiff's employment as a "co-driver" constituted the same character of employment as his employment as a "company driver."